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| <b>COMPLAINT NUMBER</b> | 22066                     |
| <b>APPEAL NUMBER</b>    | 22/007                    |
| <b>APPLICANT</b>        | Complainant               |
| <b>ADVERTISER</b>       | Kennards Hire             |
| <b>ADVERTISEMENT</b>    | Kennards Hire, Television |
| <b>DATE</b>             | 19 May 2022               |
| <b>OUTCOME</b>          | Declined                  |

## **SUMMARY**

The Chair of the Complaints Board ruled on 14 March 2022, the complaint regarding a Kennards Hire television advertisement was ruled No Grounds to Proceed.

The Complainant appealed the Decision. The appeal application was considered by the Chairperson of the Appeal Board.

The Chairperson said none of the grounds for appeal had been met and ruled the appeal application was declined.

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## **CHAIRPERSON'S RULING**

The Chairperson viewed the application for appeal. She noted that there were five grounds upon which an appeal was able to proceed. These were listed at Clause 6(c) of the Second Schedule of the Advertising Standards Complaints Board Complaints Procedures and were as follows:

- (a) The proper procedures have not been followed.
- (b) There is new evidence of sufficient substance to affect the decision.
- (c) Evidence provided to the Complaints Board has been misinterpreted to the extent that it has affected the decision.
- (d) The decision is against the weight of evidence.
- (e) It is in the interests of natural justice that the matter be reheard.

The Applicant appealed the Decision from the Chair of the Complaints Board which ruled the complaint had No Grounds to Proceed. (A full copy of the appeal is in Appendix 2 and a full copy of the Chair's ruling is in Appendix 3).

The Applicant appealed under Ground (a) - The proper procedures have not been followed, Ground (c) - Evidence provided to the Complaints Board has been misinterpreted to the extent that it has affected the decision and Ground (d) - The decision is against the weight of evidence.

The Chairperson of the Appeal Board reviewed the complaint, the advertisement, the Ruling from the Chair of the Complaints Board, and the Applicant's appeal application.

The Chairperson confirmed the appeal process considers the Chair's Ruling, the advertisement, the issues raised in the appeal application and assesses whether there is a breach of the Advertising Standards Code.

### **Role of the Chair of the Complaints Board**

The Chairperson noted the Applicant considered the Chair of the Complaints Board's No Grounds to proceed ruling "seems to be a personal opinion". The Chairperson referred to the First Schedule Rules of the Advertising Standards Authority which sets out the ASA process of delegated authority for the Chair of the Complaints Board to review and rule on complaints on behalf of the Board.

In particular the Chairperson referred to the following rules:

Rule 2.3 "To determine in its sole discretion which method of complaint determination shall be used in a particular case." and

Rule 2.8 "To delegate to the Chairperson of the ASCB either generally or specifically in respect of a particular complaint or reference the powers referred to in Rules 2.1 to 2.7"

These rules can be viewed in full through the following link:

<https://www.asa.co.nz/wp-content/uploads/2020/06/ASA-Rules-May-2020.pdf>

The Chairperson said that under the ASA rules, the Complaints Board delegation to the Chair allows a complaint to be initially assessed by the Chair of the Complaints Board to determine any potential breach of the Advertising Standards Codes. The Chair considers the issues raised by the Complainant about an advertisement based on context, medium, audience and product. The Chair also considered relevant matters such as previous decisions and generally prevailing community standards.

The Chairperson said this process had been followed in the case before her.

The Chairperson of the Appeal Board also reviewed the Applicant's appeal submission against these criteria:

### **Context**

The Chairperson noted the Chair of the Complaints Board had referred to precedent Decision 16/129 in the No Grounds to Proceed ruling which considered the word "sheet" being substituted for the word "shit". The Chairperson noted the Applicant did not consider this example to be of the same magnitude as using "ken oath" as a substitute for "fuck'n oath".

The Chairperson noted that while the Chair had quoted Decision 16/129 as an example of the substitution of swear words failing to reach the widespread offence threshold, it was not the only precedent about the use of possible expletives. The Chairperson said the

Complaints Board had considered a number of advertisements over the years which substituted a swear word with an alternative play on words and referred to two additional precedent decisions which demonstrated the Complaints Board had previously ruled on similar matters:

**Decision 15/153** concerned a radio advertisement from Vent Mechanical which used the wording “Aw truck it. My truck is trucked! Need to vent? Talk to your Vent Mechanical repairers, they service, and repair all makes and models of truck and much more...” The Complainant was concerned the advertisement was offensive even if the obscene word isn’t spoken.

The Complaints Board did not uphold the complaint and ruled the advertisement was unlikely to cause widespread offence given the attempt at humour, the target audience and placement. The Board said the product being advertised was related to the use of the word truck in the advertisement.

**Decision 17/110** concerned a radio advertisement from Forktruck Specialists Ltd and used a play on the word “fork” to suggest the swear word “fuck”. The Complainant said the substitution of words was offensive.

The Complaints Board did not uphold the complaint and ruled there was sufficient context given the Advertiser’s name included the word Fork and humour had been intended rather than offence.

The Chairperson of the Appeal Board said these additional precedents also supported the No Grounds to Proceed ruling by the Chair of the Complaints Board.

### **Placement**

The Chairperson confirmed the Kennard’s advertisement had been given a G (General) rating by the Commercial Approvals Bureau, meaning it could be played at any time. The advertisement was viewed by the Complainants during *Married at First Sight* (PGR – Parental Guidance Recommended), and news programmes TVNZ 1 News and *Prime News*, which are categorised as Unclassified Programming.

The Chairperson noted the Broadcasting Standards Authority, the co-regulatory agency responsible programme content, refers to Unclassified Programming as “news, current affairs, sports and live content that is not, because of its distinct nature, subject to classification. However, broadcasters must be mindful of children’s interests and other broadcasting standards and include audience advisories (i.e. a warning) where appropriate.”

The Chairperson said the placement of an advertisement was an important consideration of the Chair’s No Grounds to Proceed decision and she concurred the advertisement had been placed in accordance with its rating and to an audience interested in the services offered by the Advertiser.

### **Medium**

The Chairperson noted the Applicant was comparing use of a slang contraction of a swear word with the broadcaster’s bleeping of swearing which occurred during the screening of the Academy Awards. The Chairperson did not consider this to be a relevant comparison as different standards apply to programmes and advertising content. The Chairperson noted

that swearing does occur in programmes in accordance with appropriate rating, placement and content of programmes.

### **Audience**

The Chairperson said the Advertiser was likely to appeal to an adult audience with an interest in the building industry and DIY who were not likely to be offended by this type of humour. To further verify the advertisement was not targeted towards younger audiences, the Chairperson sourced the audience viewing figures for the programmes and channels viewed by the three Complainants. The percentage of children and young people under the age of 18 viewing the three programmes in question ranged from 1.3% to 3.9% of the overall viewing audience.

While the Chairperson acknowledged the advertisement could offend some viewers, she agreed it did not meet the threshold to cause serious or widespread offence.

### **Product**

The Chairperson noted the Advertiser, Kennards Hire, is an Australian company, which gave further context to the Australian slang term "ken oath". Given the Advertiser name, Kennards, the Chairperson said the "ken oath" play on words related to the company name. The Chairperson did not agree with the applicant that this ruling meant every euphemism or abbreviation for an offensive word is acceptable and said each complaint and advertisement is considered on its own merit.

The Chairperson of the Appeal Board agreed with the Chair of the Complaints Board that taking into account context, medium, audience and product, the advertisement did not meet the threshold to cause serious or widespread offence to most consumers.

The Chairperson noted the Complainant did not agree with the Chair of the Complaints Board's decision, however, disagreement is not a ground on which an appeal can be accepted.

The Chairperson said none of the grounds for appeal had been met and ruled the appeal application was declined.

**Chairperson's Ruling:** Appeal application **Declined** Complaint **No Grounds to Proceed**

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## APPENDICES

1. Description of Advertisement
  2. Appeal Application from Complainant
  3. Chair Of Complaints Board No Ground to Proceed Decision
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### Appendix 1

#### DESCRIPTION OF ADVERTISEMENT

The television advertisement for Kennards Hire shows a ceremony in which a man makes an oath to "help everyone, everywhere make their job easier". He says "ken oath!" to affirm the oath. He then walks through the door and enters the shop floor of Kennards where a woman asks for some assistance with a tool. In response, he shouts enthusiastically, "ken oath!". On screen, text states, "talk to someone who has taken the ken oath customer service pledge". The Kennards Hire logo is shown underneath.

### Appendix 2

#### APPEAL APPLICATION FROM COMPLAINANT

##### Process:

- On 21 March 2022 I received notification that the complaints against the Kennards television advertisement were not upheld.
- In accordance with the ASA appeals process, I notified ASA by email of my intention to appeal on 28 March 2022 (to [asa@asa.co.nz](mailto:asa@asa.co.nz)) – seven days following notification.
- The following are the contents of my appeal – lodged 10 days after notification.

##### Basis for Appeal:

The bases for my appeal relate to three of the five stated criteria, namely;

1. The proper procedures have not been followed.
2. Evidence provided to the Complaints Board has been misinterpreted to the extent it has affected the decision.
4. The decision is against the weight of evidence.

##### Appeal Contents:

- 1) The Chair stated "the ["Ken Oath"] phrase was part of the punch line of the advertisement and was effective only for viewers who were old enough to understand the double entendre."

a) This statement of the Chair infers that it is acceptable to offend part of the community if other parts of the community are not aware of the offensive nature of the statement. This ruling is ageist.

b) The Chair offers no evidence that only "old enough" viewers are the only segment of our community who know the "full" meaning of "Ken Oath". The Chair's statement

seems to be personal opinion without qualification or proof. In a test of one, I asked a younger generation tradesman whether "ken oath" is used in their circle and they confirmed that while the short version was not common the "full" version was common as an expletive. This age group is the centre of Kennards target audience and it is naive in the extreme that the "full" meaning was not intended in the advertisement. To contend that "the likely consumer takeout was that the Advertiser's staff are dedicated to providing a positive customer experience" is also simplistic and unlikely given the widespread knowledge in NZ society of the "full" version, even if less so the "Ken Oath" version.

2) "The Chair referred to a precedent decision 16/129"

To contend that the seriousness of the expletives "sheet" and "ken oath" are of the same order of magnitude is wrong. "Sheet" or its non-euphemistic form are used in even polite conversation (with risk) and are not seen as greatly offensive. In the same settings and even less polite, it is entirely offensive to drop the "F-bomb" and thus the euphemistic "Ken Oath" or its "full form".

Further to this, on TV1 News at approximately 6:15pm on 28 March 2022, in the report on the Oscars, Chris Rock clearly said "Will Smith slapped the shit out of me" whereas Will Smith's reply was bleeped out, assumedly because it contained words not permitted at an "unrated" time of day. This clearly demonstrates that "Sheet"/"Shit" and "Ken Oath" are of considerable different levels of offensiveness.

It is therefore not relevant to use the ruling to Decision 16/129 as a precedent in this complaint.

3) The Chair acknowledges that "in this instance also, while the phrase was suggestive of an expletive, it did not actually use the words 'fucking oath'." So, given that the actual words were not used in this case (which I assume would be judged offensive), then any euphemism or abbreviation for widely understood offensive language is acceptable and cannot be judged offensive. I expect this not to be the case and so, in this instance, the Chair has made a decision without due consideration of the direct connection between "Ken Oath" and its "full" version

.4) The Chair notes that "The Complainants said the phrase was suggestive of an expletive and was inappropriate for children to see in a television advertisement."

In not upholding this complaint, the Chair then holds that it would be of no issue if children, having seen this advertisement in prime time or an unrated period, then take the key phrase to the schoolgrounds or reply to a teacher or parent with "Ken Oath".

**Conclusion:**

I contend that the Chair has made an error of judgement in not upholding the complaints against the Kennards advertisement. I request that the original decision be overturned.

### Appendix 3

#### CHAIR OF COMPLAINTS BOARD DECISION

|                         |                           |
|-------------------------|---------------------------|
| <b>COMPLAINT NUMBER</b> | 22/066                    |
| <b>ADVERTISER</b>       | Kennards Hire             |
| <b>ADVERTISEMENT</b>    | Kennards Hire, Television |
| <b>DATE OF MEETING</b>  | 14 March 2022             |
| <b>OUTCOME</b>          | No Grounds to Proceed     |

**Advertisement:** The television advertisement for Kennards Hire shows a ceremony in which a man makes an oath to "help everyone, everywhere make their job easier". He says "ken oath!" to affirm the oath. He then walks through the door and enters the shop floor of Kennards where a woman asks for some assistance with a tool. In response, he shouts enthusiastically, "ken oath!". On screen, text states, "talk to someone who has taken the ken oath customer service pledge". The Kennards Hire logo is shown underneath.

**The Chair ruled there were no grounds for the complaint to proceed.**

**Complaint 1:** The advertisement centers around the phrase Ken-oath, which is a well known colloquialism (with slightly different spelling) for the F word.

**Complaint 2:** The advertisement states loudly and emphatically "Ken Oath" which is a play on the advertiser's name. The phrase "ken oath" is also a widely understood (and used!) abbreviation or euphemism for "fucken oath". It is widely understood as that in NZ. To use this phrase is offensive (in breach of Rule 1(c)) and particularly in prime time when all ages are likely to be watching. This advertisement has been aired on previous days also, and sometimes multiple times during prime time.

**Complaint 3:** This advertisement displays a young man being required to take what is described as "The Ken Oath" the words Ken Oath being used several times throughout the advertisement. It is quite obvious that this expression is an abbreviated form of a coarse expression, intended to reference an indecent our letter word, the full expression 'F\*\*king Oath', being used to express the sentiment, "too right" It is totally unacceptable to have this expression introduced into our home at a time when families are watching a news program and children are present. In case you think I am slightly oversensitive about this, I advise that I am a former soldier and Traffic Officer, I am not a shrinking violet, but I find this ad offensive

**The relevant provisions were Principle 1 and Rule 1(c) of the Advertising Standards Code.**

**Principle 1: Social Responsibility:** Advertisements must be prepared and placed with a due sense of social responsibility to consumers and to society.

**Rule 1(c) Decency and Offensiveness:** Advertisements must not contain anything that is indecent, or exploitative, or degrading, or likely to cause harm, or serious or widespread offence, or give rise to hostility, contempt, abuse or ridicule.

The Chair noted the Complainants found the use of the words “ken oath” in the advertisement offensive. The Complainants said the phrase was suggestive of an expletive and was inappropriate for children to see in a television advertisement.

The Chair reviewed the advertisement. She said the likely consumer takeout was that the Advertiser’s staff are dedicated to providing a positive customer experience.

The Chair then considered whether the use of the words “ken oath” was likely to cause serious or widespread offence. The Chair referred to a precedent decision 16/129 about an advertisement for Handee Ultra paper towels in which the word “sheet!” was used when an individual spilt something. The Complaints Board did not uphold the complaint.

The decision stated in part, that the use of the word ‘sheet’,

“...was employed as a double entendre relating to the reactions of people to accidental spills and suggesting consumers only required a single sheet of Handee towel to clean up a spill. The Complaints Board said the advertisement was light hearted and humorous and while suggestive of an expletive, did not actually use the word ‘shit’.”

The Chair said that similarly, the phrase “ken oath” was a play on words. The advertisement was based on the idea that the “ken oath” was a pledge made by employees of the Advertiser, being ‘Kennards’. It could also refer to the colloquial expression of agreement, “fucking oath”.

The Chair said that in this instance also, while the phrase was suggestive of an expletive, it did not actually use the words ‘fucking oath’. She said the phrase was part of the punch line of the advertisement and was effective only for viewers who were old enough to understand the double entendre.

The Chair then confirmed the rating of the advertisement. The Commercial Approvals Bureau classified the advertisement ‘General’, meaning it may be broadcast any time. Two Complainants saw the advertisement during news programmes, which are unrated, and the other Complainant saw the advertisement during *Married at First Sight*, which is rated PG and targeted to an adult audience. The Chair confirmed the advertisement played within its afforded rating and had been placed responsibly.

The Chair said taking into account the context, medium, product and audience, the advertisement was unlikely to offend against generally prevailing community standards or cause serious or widespread offence. She said the advertisement was not in breach of Principle 1 or Rule 1(c) of the Advertising Standards Code.

The Chair ruled there were no grounds to proceed with the complaints.

**Chair’s Ruling:** Complaint **No Grounds to Proceed**